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Attorney for Defendants

Douglas and Eileen James

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

BANK OF AMERICA, N. A.,

Plaintiff,

v.

DOUGLAS A. JAMES; EILEEN JAMES;  
VILLAGE ESTATES CONDOMINIUM  
OWNERS ASSOCIATION and ALL  
OTHER PARTIES UNKNOWN  
CLAIMING ANY RIGHT, TITLE,  
LIEN, OR IN THE REAL PROPERTY  
COMMONLY KNOWN AS 30366 SW  
RUTH STREET #70, WILSONVILLE,  
OR 97070,

Defendants,

BANK OF AMERICA, N. A.,

Counterclaim Defendant

**Case No: 3:16-cv-02233-PK**

**DEFENDANT'S DOUGLAS A. JAMES  
and EILEEN JAMES ANSWER,  
AFFIRMATIVE DEFENSES AND  
COUNTERCLAIMS TO JUDICIAL  
FORECLOSURE COMPLAINT**

**JURY TRIAL REQUESTED**

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## **I. ANSWER**

1. Unless specifically admitted, Defendants Douglas A. James and Eileen James (“Defendants”) deny all the allegations in Plaintiff’s Complaint for Judicial Foreclosure. For their Answer, the Defendants plead as follows:

2. The Defendants deny venue and jurisdiction is proper in State Court. Jurisdiction and venue are now proper under federal removal jurisdiction based on diversity of citizenship and the Court’s supplement jurisdiction under 28 U.S.C. § 1367, as the supplemental state law claims involve the same case or controversy between the parties.

3. Defendants are without knowledge of whether the allegations in paragraph 2 are true and therefore deny them.

4. Defendants admit the property address in paragraph 3 is 30366 SW Ruth Street #70, Wilsonville, OR 97070 but are without knowledge if the legal description is correct and therefore deny it.

5. Defendants deny paragraph 4 where Plaintiff states it has the authority to exercise the interest in the deed of trust. Defendants admit the Exhibit 2 says what it says but are without knowledge if it is a true and correct copy of the Deed of Trust and therefore deny that it is.

6. Defendants admit paragraph 5 to the extent that the Deed of Trust says what it says.

7. Defendants are without knowledge of the allegations in paragraph 6 and 7 and therefore deny them.

8. Defendants admit that Exhibit 3 (“Note”) says what it says but are without knowledge if it is a true and correct copy of the instrument and therefore deny that it is.

9. Defendants deny paragraph 9.

10. Defendants admit the Note and Deed of Trust say and deny the balance of paragraph 10.

11. Defendants deny paragraph 11.

12. Defendants admit that Exhibit 4 says what it says. The Defendants do not have information to know whether the Exhibit 4 is a “true and correct copy” and therefore deny that it is. The Defendants deny the balance of paragraph 12.

13. Defendants deny paragraph 13 and 14.

14. Defendants plead as they have in this Answer to paragraphs 1 through 14.

15. Defendants deny paragraphs 16 – 18.

16. As to paragraph 19 the Defendants Answer as follows. The Defendants admit that the Deed of Trust says what it says about an award of attorney fees. To the extent that the Deed of Trust provides for attorney fees, costs and expenses to be awarded only to the Plaintiff, the Defendants deny that such a provision is allowed under Oregon law. Pursuant to Oregon law the Defendants assert their right to attorney fees, costs and expenses under ORS 20.096 and/or ORS 20.083 and/or ORS 20.097.

17. The Defendants deny paragraphs 20 – 28.

## **II. FACTS COMMON TO ALL AFFIRMATIVE DEFENSES**

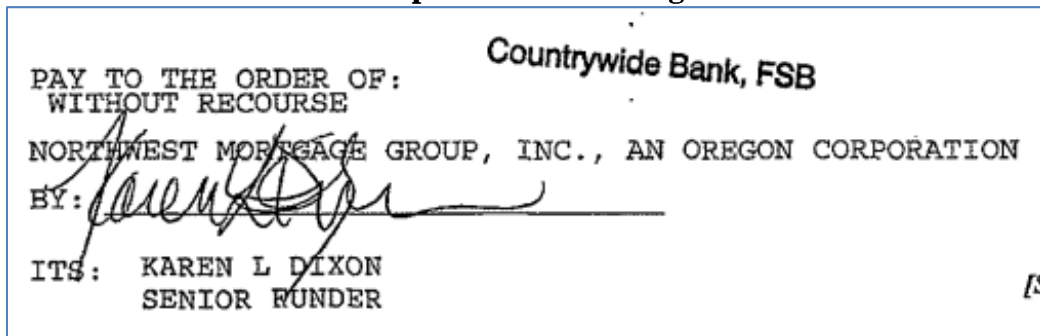
18. Mortgage Electronic Registration Systems (MERS) is named as the beneficiary in the Defendants Deed of Trust. In 2010, MERS assigned its interest to Plaintiffs Bank of America, N.A. (BANA). BANA then appointed ReconTrust (RECON) as the Successor Trustee

and RECON subsequently filed a non-judicial foreclosure against the Defendants in July 2010.

19. The Defendants responded by filing a wrongful foreclosure action in Clackamas County which was removed this District Court by BANA a short time later. On September 6, 2012, District Judge Simon ruled that MERS could not be a beneficiary under Oregon law and dismissed the case. Subsequent litigation by other parties eventually led to the Brandrup and Niday rulings by the Oregon Supreme Court in 2013.

20. Now comes BANA, over six years after its first failed foreclosure attempt on the Defendant's property, and files a judicial foreclosure claiming it is the "holder of the Note" (Complaint ¶ 9). BANA further claims the Note is endorsed in blank which converts the Note to bearer paper. This allegation is false. The endorsement on the Note attached to the Complaint as Exhibit 3 looks official but is not endorsed in blank as BANA represents in its Complaint.

**2016 Complaint Exhibit 3 Page 3 of 4**



21. BANA then fails to mention that the Note it produced as a "true and correct copy" of the instrument, as required by its participation in not one, but two, Oregon Foreclosure Avoidance Program mediations (OFAP) (2014 & 2015) is not the same Note that it produced as a "true and correct copy" in support of its authority to foreclose in this case.

**2014 & 2015 OFAP Notes**

PAY TO THE ORDER OF: WITHOUT RECOURSE	
NORTHWEST MORTGAGE GROUP, INC., AN OREGON CORPORATION	
BY: _____	
ITS: _____	

22. The endorsement on the Note BANA presented to this Court as Exhibit 3 to its judicial foreclosure action is a forgery.

23. It was not possible for the Defendants to know, in the exercise of reasonable care, that the Note contained a forged endorsement on it until this law suit was filed on or about October 10, 2016.

**Predicate Criminal Acts**

24. The Plaintiff or those in privity with it or the Plaintiff's agents are responsible for having committed and are liable for the crime of second degree forgery under ORS 165.007.

25. The Note is a written instrument as defined in ORS 165.002(1).

26. The Plaintiff or its agents or those in privity with the Plaintiff falsely altered the Note as defined in ORS 165.002(6) by placing endorsements on the Note to make it appears that it had been endorsed in blank and therefore was enforceable by the Plaintiff or its agents when it was not.

27. By seeking to enforce the Note against the Defendants, by commencing this action based on the altered Note, and by continuing to represent the Note to be original and authentic, Plaintiff has uttered the Note with knowledge that the Note had been altered and forged, as set forth in ORS 165.007(1)(a) and (1)(b).

**Criminal Forgery (First Degree)**

28. The Plaintiff or those who have aided and abetted it or those who are in privity with it, and for which the Plaintiff has liability for and each of them, have knowingly committed the crime of first degree forgery under ORS 165.013.

29. The Plaintiff and its predecessors for which Plaintiff has liability, and each of them, are persons who have violated ORS 165.007 (Forgery in the Second Degree) as set forth above, as defined in ORS 165.013(1); and the altered Note is:

- a. a written instrument representing interests in or claims against any property or person as set forth in ORS 165.013(1)(a)(B),
- b. a contract as set forth in ORS 165.013(1)(a)(C), or
- c. a commercial instrument evidencing, creating, transferring, altering, terminating, or otherwise affecting a legal right, interest of obligation as set forth in ORS 165.013(1)(a)(D).

**Criminal Possession of Forged Instrument**

30. The Plaintiff and/or its predecessors in interest have knowingly committed the crime of possession of a forged instrument under ORS 165.022.

31. The Plaintiff remains in possession of the forged Note and is seeking to enforce and utter the Note with knowledge that it has been altered and forged of the kind and amount specified in ORS 165.013(1).

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### **III. AFFIRMATIVE DEFENSES**

32. Defendants re-allege each allegation as set forth above and incorporate each by reference as if each set forth herein in all its affirmative defenses.

#### **FIRST AFFIRMATIVE DEFENSE (Failure to State a Claim)**

33. Plaintiff has failed to state facts sufficient to support any claim for relief against the Defendants. The endorsement on the Note has been forged as recently as this year. Therefore, the Note is void.

#### **SECOND AFFIRMATIVE DEFENSE (Not the Real Party in Interest)**

34. BANA may be in possession of a Note but the endorsement on the instrument is forged and therefore the Note is void and BANA may not enforce it.

#### **THIRD AFFIRMATIVE DEFENSE (Lack of Standing)**

35. BANA is not the beneficiary of the Note. The endorsement on the Note is forged and, therefore, the Note is void and BANA is not the beneficiary of the Note.

#### **FOURTH AFFIRMATIVE DEFENSE (Failure to Plead a Condition Precedent)**

36. The Note is void and has not been properly negotiated and Defendants deny that the conditions precedent necessary for recovery hereunder have occurred.

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#### **IV. COUNTERCLAIMS**

##### **FIRST COUNTERCLAIM**

(Declaratory Judgment ORS 28,010-28.160)

37. The Defendants re-allege paragraphs 1 through 36 above as if set forth in full herein.

38. Paragraphs 1 – 31 of the Defendants' Answer alleges ultimate facts showing the existence of an actual controversy relating to legal rights and duties of the respective parties.

39. The Plaintiff has asserted in its Complaint that there is a controversy relating to the legal rights and duties of the respective parties. The Plaintiff asserts it has a right to foreclose on the Defendants' home. The Defendants have contested that the Plaintiff has such a right.

40. The parties both have asserted legally protectable interests in the controversy as demonstrated in the Plaintiff's action and the Answer, Affirmative Defenses and Counterclaims of the Defendants.

41. The controversy is ripe for adjudication.

42. The Defendants ask the Court to determine the legal rights and obligations of the parties to this controversy including but not limited to determining if in fact the Note which the Plaintiffs seek to foreclose on is forged and whether the Plaintiff in fact is the proper party to foreclose along with any other relief the Court finds just and proper.

43. The Defendants also claim their right to attorney fees, expenses, and all costs as more particularly set forth in paragraph 16.

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### **PRAYER FOR RELIEF**

1. Wherefore, Defendants prays for relief as follows on their claims:
2. That the Plaintiff take nothing by its Complaint and that all relief it seeks is denied.
3. Defendants pray for their attorney fees, costs and expenses under the Deed of Trust and the Note as well as under ORS 20.096 and/or ORS 20.083 and/or ORS 20.097.
4. For any other relief the Court finds to be just and reasonable.

### **DEMAND FOR JURY TRIAL**

Defendant James hereby demands trial of his claims by jury to the extent authorized by law.

DATED: December 28, 2016

/s/ Terry Scannell  
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Attorney for Defendants  
Douglas and Eileen James

**CERTIFICATE OF SERVICE**

I hereby certify that on December 28, 2016, I electronically filed the foregoing **DEFENDANT'S DOUGLAS A. JAMES and EILEEN JAMES ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO JUDICIAL FORECLOSURE COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send email notification of such filing to the following:

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Dated: December 28, 2016

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